

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

33-4

966

BRIEF FOR APPELLANT

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,806

United States of America,

Appellee.

v.

Jerry L. Hunter

Appellant.

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 17 1970

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March 16, 1970

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Appeal from the United States District Court
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BRIEF FOR APPELLANT

Statement of Issues

1. Whether the appellant's conviction must be reversed because the prosecution's use before trial of photographs showing only appellant and a co-defendant was impermissibly suggestive and fatally tainted the complaining witnesses' subsequent in-court identification of appellant.

2. Whether the appellant's conviction must be reversed because the Trial Court erred in refusing to declare a mistrial after the introduction of inflammatory and prejudicial testimony of the complaining witness to the effect that suspects in a police line-up (which included the appellant) were "masturbating" and performing obscenities at the time she viewed the line-up.

3. Whether appellant's conviction must be reversed because the Trial Court abused its discretion in refusing the appellant the opportunity to call as a corroborating witness, an individual who had been present during the trial, but whose testimony became important to appellant at the later stages of the trial once the co-defendant repudiated the appellant's alibi defense.

4. Whether the appellant's conviction must be reversed because the Trial Court erred in refusing to declare a mistrial and grant appellant's motion for relief from prejudicial joinder once the co-defendant, through counsel, repudiated and otherwise disavowed the appellant's alibi defense.

* * * * *

This case has not previously been before this Court.

* * * * *

REFERENCES TO RULINGS

1. MEMORANDUM-ORDER FILED BY JUDGE GASCH ON SEPTEMBER 8, 1969.
2. DISTRICT COURT'S RULING ON IDENTIFICATION TESTIMONY.
Tr. 67-70.
3. DISTRICT COURT'S RULING ON IDENTIFICATION TESTIMONY.
Tr. 207-208.
4. DISTRICT COURT'S RULING ON EXCLUDING APPELLANT'S FATHER AS
A CORROBORATING WITNESS. Tr. 437, 439.

STATEMENT OF THE CASE

Appellant Hunter was indicted November 5, 1968, on six counts. The indictment charged that on or about October 1, 1968, Hunter and James O. Gambrill committed the following offenses in violation of the D.C. Code: rape of Claire Oosterhof (count one); robbery from and assault with a dangerous weapon on Claire Oosterhof (counts two and three); robbery from and assault with a dangerous weapon on Phillip M. Murawski (counts four and five); and use of an automobile owned by Continental Driveaway, Inc., without the owner's consent (count six). Hunter and Gambrill were tried together and, on June 23, 1969, the jury returned a verdict of guilty as to each defendant on all counts.

The facts pertaining to the charged offenses are as follows: At approximately 10:30 p.m. on the evening of October 1, 1968, Phillip M. Murawski, with Claire Oosterhof as a passenger, parked a red, 1966, Chevrolet automobile in Rock Creek Park picnic grove 6-A-1 (Tr. 121-123, 90-91).

There were two light poles in the area (Tr. 93). The closest pole was located approximately 60 feet from the front seat of the car; the other, 235 feet. (Tr. 93, 109, 62, 59). ^{1/}

^{1/} The nearest light pole was 50 feet north of the rear of the car (Tr. 94, 109). Since the car was 16-17 feet long (Tr. 62), this pole was about 60 feet from the front seat of the car. The second pole was 175 feet north of the first (Tr. 59), and thus was 235 feet from the front seat.

About 12:30 a.m. on October 2, 1968, two men appeared at the car, one at the driver's side and one at the passenger's side (Tr. 124). Complainants Murawski and Oosterhof gave conflicting accounts as to which of the two men approached which side of the car. Murawski insisted that the shorter of the two men approached his side of the car (Tr. 43, 57, 135, 142). Miss Oosterhof, on the other hand, insisted that the shorter of the two men approached her side of the car (Tr. 54-55, 214-15, 256-57). The two men ordered the complainants out of the car and then proceeded to open the doors and pull them from the car (Tr. 214, 125).

The assailants spent approximately 2 to 3 minutes at the car (Tr. 44, 49). Mr. Murawski testified that the area of the parking lot was well-lighted (Tr. 147). However, he also testified that both men were wearing masks (Tr. 11-12). Miss Oosterhof testified that she was able to make out facial features in the light that was available in the parking lot (Tr. 48). However, she also testified that while Gambrill was wearing a mask, she did not know whether Hunter was also wearing a mask (Tr. 51). A United States Park Police officer who subsequently examined the area stated that there was some light in the area, sufficient to distinguish objects (Tr. 109).

With the complainants walking between them (Tr. 50, 149), the two men proceeded about 25 feet west of the car (Tr. 43) and

then down a slope to a sandy "beach" area at the edge of Rock Creek (Tr. 95, 125). The nearest light pole was at least 40 feet from the spot where the assailants and the complainants entered the "beach" area (Tr. 97).

The "beach" area itself was about 4 feet lower than the parking lot (Tr. 97, 150) and was illuminated only by light from the lot filtering through the surrounding shrubbery and trees (Tr. 46, 51). As a result, the light in that area was dimmer than that at the car (Tr. 44, 46, 148)).

Miss Oosterhof described the area as "pretty dark" (Tr. 47). When asked by counsel for defendant Hunter whether Hunter was wearing a mustache, Miss Oosterhof replied that "it was too dark to see". (Tr. 52). Mr. Murawski described the lighting in this area as "dim" (Tr. 46).

The assailants allegedly took Mr. Murawski's wallet, containing about \$20.00 and several credit cards (Tr. 126). They then tied Mr. Murawski's hands and, while one of the two men sat on Murawski, the taller of the two men attempted unsuccessfully to rape Miss Oosterhof over a period of about 10 minutes (Tr. 127, 219). Following this, the second man then raped Miss Oosterhof (Tr. 48, 219).

Miss Oosterhof testified that the first individual and the taller of the two was Hunter (Tr. 217) and the second was

Gambrill (Tr. 219). During this time, Miss Oosterhof was "terrified" and "hysterical" (Tr. 50, 220) and thought that the men were going to kill her and Mr. Murawski (Tr. 220). Mr. Murawski was tied up and, to some extent, prevented from seeing either assailant (Tr. 45, 127, 129-30).

The assailants then left, taking the car which Mr. Murawski was driving with them (Tr. 133). The total elapsed time from the appearance of the assailants until their departure was 15 to 30 minutes (Tr. 44, 49).

Miss Oosterhof thereafter described her two assailants to the police as follows: One man was bigger, taller and had short hair. The other was thinner, shorter and had thicker hair. They both appeared to be in their twenties (Tr. 15, 223-24).

Mr. Murawski described the two men to the police as follows: The first was Negro, about 5-10 in height, weighing about 150 to 160 pounds, medium build, medium complexion and short hair. He was wearing a light-colored, summer jacket with a zipper, dark trousers and a mask. The second was Negro, about 6 feet tall, weighing about 180 pounds, medium build, medium complexion and short hair. He was wearing a light-colored, summer jacket, dark trousers and mask. They were both approximately 20 or 21 years of age (Tr. 11-12, 135).

The Arrest

The facts and circumstances pertaining to the arrest of appellant Hunter are as follows: At about 1:50 a.m. on October 3, 1968, Officer Joseph Alberti of the Metropolitan Police Department spotted stolen license tags on a white Valiant automobile (Tr. 349-50). The car was being operated by Hunter (Tr. 337), with his co-defendant Gambrill as a passenger (Tr. 339). As the police pulled the Valiant over, Officer Alberti noticed Gambrill leaning over and putting some type of object down on the floor (Tr. 350). After the car was pulled over, the police learned that the Valiant was a stolen car (Tr. 340).

Hunter and Gambrill were then arrested for larceny of the tags and the automobile (Tr. 339-40). Officer Alberti searched the automobile and discovered the license tags which belonged to the automobile under the seat where Gambrill was sitting, as well as three credit cards and one driver's license, all in the name of the complainant Phillip Murawski, under the floor mat on the passenger's side of the automobile (Tr. 352). Hunter and Gambrill were then taken to No. 13 Precinct where it was discovered that the credit cards had been taken in the rape and robbery which are the subject matter of this case (Tr. 358). At that time, they were charged with the offenses at issue herein (Tr. 358).

The Line-Up

The facts and circumstances surrounding the line-up conducted in this case are as follows: On October 8, 1968, Mr. Murawski and Miss Oosterhof separately viewed a line-up consisting of Hunter, Gambrill and five others (Tr. 25-27, 30). Each complainant was told that the two individuals arrested for the rape-robbery offenses were in the line-up (Tr. 22, 135), and, in point of fact, both Hunter and Gambrill were in the line-up (Tr. 25).

Mr. Murawski was unable to identify either appellant Hunter or Gambrill (Tr. 146). The police then asked him to pick out an individual that looked familiar (Tr. 146). He then selected one person (neither appellant Hunter or Gambrill) because of his hair style (Tr. 146).

Miss Oosterhof selected two individuals from the line-up (Tr. 227). One of the two selected was the appellant Hunter (Tr. 227). She was not, however, identifying the two men as her assailants, but merely as two men who reminded her most of her assailants (Tr. 227).

Thereafter, Hunter's counsel asked Miss Oosterhof whether, when she selected the two individuals from the line-up, she was saying that either one or both of them were her assailants or whether she was saying that those individuals simply resembled her assailants. She replied, "I was saying they resembled". (Tr. 244).

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Miss Oosterhof viewed the line-up for a period of about 5 minutes (Tr. 35). In characterizing the lighting at the line-up, Miss Oosterhof said, "*** the men in the line-up were in a very lighted area" (Tr. 240). She compared the lighting conditions at the line-up with the lighting conditions at the place the assault occurred by saying, "There was a direct glare on the men in the line-up. The light was fairly dim the night that it happened" (Tr. 240).

At the time of the line-up, Miss Oosterhof was upset and terrified (Tr. 55, 224). She testified that "*** a lot of them [the suspects in the line-up] were saying and doing very disgusting things" (Tr. 225). In answer to a question by the Assistant U. S. Attorney, she said that "*** some of them were masturbating openly" (Tr. 225). Hunter was never identified as being one of the men who was masturbating and his counsel objected to the testimony (Tr. 226). In addition, counsel moved for a mistrial based on the prejudicial effect of this statement (Tr. 372).

The Photographs

On January 28, 1969, during preparation for trial, Miss Oosterhof was shown two color Polaroid photographs of the defen-

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dants standing side by side (Tr. 169-70).^{2/} The facts surrounding the showing of these photographs are as follows: Miss Oosterhof was seated next to an unidentified police officer, across a desk from the Assistant U. S. Attorney, preparing for trial in this case (Tr. 170-71). She stated that one of her assailants was taller than the other (Tr. 170). The officer stated that he recalled that the assailants were the same size (Tr. 175). The police officer then produced the photographs and, after viewing them, Miss Oosterhof and the officer agreed that one of her assailants was taller than the other (Tr. 170-71).

The officer then asked Miss Oosterhof if she recognized the men in the photographs as the persons who had raped her and she said that she was not sure (Tr. 171). Mr. Murawski, to whom the photographs were also shown, was similarly unable to identify the men in the photographs as the assailants (Tr. 159-60).

In an evidentiary hearing concerning these photographs, conducted June 19, 1969, counsel for co-defendant Gambrill asked Miss Oosterhof the following question:

^{2/} Since the incident occurred on October 2, 1968 (Tr. 8-9), these photographs were shown to Miss Oosterhof more than three months after the incident. In addition, since the line-up occurred on October 8, 1968, (Tr. 12) these photographs were shown to Miss Oosterhof more than three months after the line-up.

"Q. Do you feel that your having seen those photographs also contain[s] in it some element of suggestion in view of the fact you were told those were the suspects?"

Miss Oosterhof replied:

A. "I think probably it does." (Tr. 179)

Identification Hearings and Trial

On June 17, 1969, a pretrial hearing was held to consider the propriety of an in-court identification (Tr. 4 et seq.). After the complainants and the police officer who had conducted the line-up had testified (Tr. 8 et seq., 14 et seq., 24 et seq.), the Trial Judge, sua sponte, recalled the two complainants for further testimony concerning the circumstances surrounding the offenses (Tr. 41). The prosecution also called a Park Police officer (Tr. 57). During this hearing, the prosecutor asked Miss Oosterhof the following question:

"Q. Is there anything about these two persons in this courtroom to suggest to you that the people sitting here in the courtroom who are charged with this crime, are the people who committed the crime?"

She replied:

A. "Well, I think I might be looking for them, but I think they are the people and I wouldn't say they were if I didn't think so". (Tr. 49-50)

The Trial Judge then ruled that Miss Oosterhof would be permitted to make an in-court identification before the jury (Tr. 67-70).

On June 18, 1969, on recross examination counsel for defendant Hunter elicited testimony from Mr. Murawski that he was shown a picture of the two defendants subsequent to the lineup and the preliminary hearing (Tr. 159). As a result, on June 19, 1969, the identification hearing was ordered resumed out of the presence of the jury (Tr. 169), after which the Trial Judge again ruled that Miss Oosterhof would be permitted to make an in-court identification (Tr. 207-08). Thereafter, she identified both Hunter and Gambrill to the jury as her assailants (Tr. 215). Mr. Murawski was unable at trial to identify either Hunter or Gambrill as one of his assailants (Tr. 136-37).

Two government witnesses gave testimony linking the appellant Hunter with the crimes. Police Officer Jessup E. Fletcher testified that on October 3, 1968, he located the Chevrolet automobile taken from Murawski one block from the home of appellant Hunter's parents (Tr. 262-63, 265). Police Officer Edward J. Dion testified that appellant Hunter's fingerprint was lifted from the outside surface of the left front vent window of the Chevrolet (Tr. 317-18).

Appellant Hunter offered two witnesses; his brother (McKinley Hunter) and his brother's girlfriend (Branda Black).

McKinley Hunter testified that both appellant Hunter and Gambrill were at his home in Hyattsville, Maryland all day Tuesday, October 1, 1968, and remained there until 8:00 or 9:00 in the morning of the following day, October 2, 1968 (Tr. 382-83). He testified that he saw Hunter and Gambrill at 11:30 p.m. on October 1, 1968, at approximately 1:00 a.m. on October 2, 1968, and at approximately 5:00 a.m. on the same day (Tr. 383-35).

Branda Black testified that she went to visit McKinley Hunter about 10:00 in the evening on October 1, 1968 (Tr. 416-17). She testified that Hunter and Gambrill were there when she arrived (Tr. 418) and that she saw them there at approximately 1:00 a.m. on October 2, 1968 (Tr. 419) and also around 4:00 a.m. on the same morning when she left (Tr. 420).

Counsel for defendant Hunter also attempted to call appellant Hunter's father (McKinley Hunter, Sr.) as a corroborating witness (Tr. 436), although he had been present in the courtroom throughout the trial (Tr. 436-37). Counsel had previously interviewed him and had felt that he could not offer any material testimony on behalf of the appellant (Tr. 436). However, following the testimony of McKinley Hunter and Branda Black, McKinley Hunter, Sr. approached counsel and indicated that he could corroborate some of their testimony (Tr. 437). Counsel for the

appellant Hunter, then approached the bench and made a proffer of the corroborating testimony sought to be introduced through McKinley Hunter, Sr. Counsel for the co-defendant Gambrill vigorously opposed permitting McKinley Hunter, Sr. to testify and repudiated and disavowed the alibi defense offered by the appellant Hunter.

The Trial Judge, over counsel's objection, ruled that McKinley Hunter, Sr. would not be permitted to testify (Tr. 437). Later, counsel for Hunter renewed his request to call McKinley Hunter, Sr., which request was again denied (Tr. 439).

Counsel for the appellant Hunter moved for a mistrial on the basis of that ruling and for relief from prejudicial joinder, the co-defendant Gambrill, through counsel, having repudiated, scorned and disavowed the alibi defense. ^{3/} Both

3/ During discussions concerning appellant Hunter's proffer of testimony by McKinley Hunter, Sr., counsel for the co-defendant Gambrill disavowed the alibi defense characterizing it as an "...inherent [sic] incredible situation." He then moved simultaneously for a mistrial and for severance. Both were denied, whereupon counsel for the co-defendant Gambrill requested and obtained an instruction to the jury as follows:

Ladies and gentlemen, at this time I have this statement to make to the jury.

I have been asked by Mr. Gambrill's attorney to advise you that the witnesses called by Mr. Hunter's attorney are offered on behalf of Mr. Hunter only. (Tr. 411).

motions were denied (Tr. 439-40).

As stated hereinabove, the jury subsequently returned a verdict of guilty against both defendants on each of the six counts set out in the indictment.

ARGUMENT

I. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THE PROSECUTION'S USE BEFORE TRIAL OF PHOTOGRAPHS SHOWING ONLY APPELLANT AND A CO-DEFENDANT WAS IMPERMISSABLY SUGGESTIVE AND FATALLY TAINTED THE COMPLAINING WITNESS' SUBSEQUENT IN-COURT IDENTIFICATION OF APPELLANT. ^{4/}

In Simmons v. United States, 390 U.S. 377 (1968), the Supreme Court recognized the danger "*** that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals". [390 U.S. at 383.] The Court noted that this danger is increased if the photographs focus on a particular individual or if the police indicate to the witness that they have evidence that the person pictured committed the crime (See 390 U.S. at 383). The Court, in Simmons stated that: "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent *** courtroom identification". [390 U.S. at 383-84.]

In recognition of this danger, the Supreme Court held:

^{4/} In support of Appellant's Argument I, the Court's attention is respectfully directed to the following pages of the transcript. Tr. 8, 11-13, 15-16, 25, 41-42, 44-52, 54, 122-124, 135-137, 159-160, 169-172, 175, 179-180, 207-208, 215, 220-221, 224, 227, 244, 251-252, 262-263, 316-317, 337, 352.

*** convictions based on eyewitness identification at trial following a pre-trial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." [390 U.S. at 384.]

The Trial Judge found the Simmons standard to be relevant to this case. Nevertheless, over the objections and arguments of counsel, the Court erroneously permitted Miss Oosterhof to make an in-court identification of the appellant Hunter as one of her assailants (Tr. 184, 208).

The appellant Hunter contends that, as applied to the facts of this case, the Simmons decision and the guidelines therein set forth, required exclusion of the in-court identification. In making this assertion, it is recognized that here, unlike the situation in Simmons, no identification was made upon viewing the photographs (Tr. 160, 171, 175). However, the dangers inherent in the use of photographs to identify criminal suspects is similarly present and the possibility remains that the witness may retain the image of the photograph rather than the image of the person actually seen.

The Supreme Court pointed out in Simmons that the standard enunciated was in accord with the decision in Stovall v. Denno, 388 U.S. 293 (1967). (See 390 U.S. at 384.) Accordingly, under

these two decisions, any claim that the photographic procedure was so unduly prejudicial as to fatally taint any subsequent conviction must be evaluated in light of the totality of surrounding circumstances. [390 U.S. at 302.]

Stovall makes clear that the circumstances to be considered are the circumstances surrounding the identification and not those surrounding the entire crime. (See 388 U.S. at 302.)

In considering the claim of prejudicial identification procedure, the Court, in Simmons, first found that there was a necessity for the use of the photographic identification. (See 390 U.S. at 384-85.) In the case at bar, unlike Simmons, there was no necessity for use of the photographs. In this regard, the Trial Judge specifically said there was "*** no reason for showing the witness Oosterhof these pictures. There has [sic] been at the time the pictures were shown an indictment, and the defendants were either in custody or on bond***." (Tr. 207-08.)

Further, the Supreme Court, in Simmons, found that the circumstances surrounding the identification were such that there was little chance that the identification procedure used led to misidentification. (See 390 U.S. at 385.) By contrast, the circumstances of this case clearly show that use of the photographs here was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The following comparisons are illustrative:

1. In Simmons, the robbery took place in the afternoon in a well-lighted bank. (See 390 U.S. at 385.) The rape, assault and robbery in this case took place at 12:30 a.m. in the morning (Tr. 124). Complainant Murawski said there was sufficient light in the parking lot to see other persons (Tr. 41-42). As to the area where the incidents took place, he characterized the lighting as "dim" (Tr. 46). Miss Oosterhof said that she was able to make out facial features in the light that was available in the parking lot (Tr. 48). She testified that it was "fairly dark" where the assaults occurred (Tr. 47). Although she said she could see faces, she also said that it was too dark to tell whether Hunter was wearing a mustache (Tr. 52).

2. The persons perpetrating the robbery in Simmons wore no masks. (See 390 U.S. at 385.) In the case at bar, Mr. Murawski testified that both assailants wore masks (Tr. 11-12). In addition, he said "I was trying to see through the mask and it bothered me not to be able to see the facial features". (Tr. 45.) Miss Oosterhof testified that when the two men came up to the car Gambrill was wearing a mask but she did not know whether Hunter was (Tr. 51). She also said that she saw Gambrill's face when he took his mask off after having intercourse with her (Tr. 220-21).

3. In Simmons, five bank employees had been able to see the individual later identified as Simmons for periods ranging up to five minutes. (See 390 U.S. at 385.) In this case, the two men were at the car for 2 to 3 minutes (Tr. 44, 49). The total elapsed time that Mr. Murawski and Miss Oosterhof were in the presence of their assailants was from 15 to 30 minutes (Tr. 44, 49). However, as noted above, the lighting was of considerably poorer quality than that in Simmons and both men wore masks for a portion of this time.

4. The witnesses in Simmons were shown the photographs only a day later, while their memories were still fresh from the event itself. (See 390 U.S. at 385.) Here, Mr. Murawski and Miss Oosterhof were shown these pictures on January 28, 1969 (Tr. 170). The assaults and robbery had taken place on October 2, 1968 (Tr. 8), more than three months previous. Moreover, as to the suspects shown in the photographs, the police and the prosecutor knew or had reason to know that the memories of the witnesses were not fresh since they had previously failed to identify these men at the line-up held on October 8, 1968 (Tr. 12-13, 25, 244).

5. In Simmons, at least six photographs were shown to each witness and there consisted primarily of group photographs. (See 390 U.S. at 385.) Here, only two photographs were shown to the witnesses (Tr. 159, 169-70). These photographs showed the

defendants side by side (Tr. 170-71).

6. In Simmons each witness was alone when he or she saw the pictures. (See 390 U.S. at 385.) Although the witnesses in the present case were together when these pictures were shown, apparently they viewed them separately (Tr. 171).

7. There was no evidence to indicate that the officers in Simmons had told the witnesses anything about the progress of the investigation or that the witnesses in any way knew that the persons in the pictures were under suspicion. (See 390 U.S. at 385.) Here, both complaining witnesses knew that the individuals pictured had been arrested and charged with the crime against them (Tr. 159, 172) at the time they viewed the photographs.

8. In Simmons, all five eyewitnesses made a positive identification of Simmons. (See 390 U.S. at 385.) Here, after viewing the photographs, neither witness identified either Hunter or Gambrill (Tr. 160, 171). Miss Oosterhof stated she "wasn't sure" they were the men (Tr. 171). She did not positively exclude them. Similarly, Mr. Murawski did not exclude them (Tr. 160). Even though neither witness positively identified the defendants from the photographs, the possibility nevertheless existed that they would retain the image of the photograph rather than the image of the person actually seen.

9. In Simmons, the initial identifications were confirmed by all witnesses at subsequent viewings and at trial. (See 390 U.S. at 385.) Here, as noted above, absolutely no positive pretrial identification was made by either witness. Following the inconclusive line-up on October 8, 1968, there were no subsequent viewings until the trial at which the witness Murawski was unable to identify either individual in the photographs as his assailants (Tr. 136-37). On the other hand, Miss Oosterhof, at trial, identified both individuals shown in the photographs as her assailants (Tr. 215).

10. On cross-examination in Simmons, none of the witnesses displayed any doubt about their respective identifications. (See 390 U.S. at 385.) In a hearing concerning the identification issue, in the case at bar, the witness Oosterhof was asked by the prosecutor whether there was anything about the two persons in the courtroom to suggest to her whether they were the individuals who committed the crime. She replied, "Well, I think I might be looking for them, but I think they are the people and I wouldn't say they were if I didn't think so". (Tr. 49-50.) During cross-examination, the witness Oosterhof was asked whether viewing the photographs had some element of suggestion in view of the fact that she was told that the men in the pictures were the suspects. She replied, "I think probably it does". (Tr. 179).

11. Unlike the witnesses in Simmons, the witness Oosterhof in the present case testified that she was "terrified" and "hysterical" at the time of the assaults (Tr. 50, 220), thus further impairing her ability to observe and subsequently identify her attackers without the assistance of the photographs in question.

When evaluated in the light of the guidelines established in Simmons, the totality of circumstances in this case clearly shows that the use of the photographs was so impermissibly suggestive as to give rise to a very substantial likelihood of an irreparable misidentification. To recapitulate, (1) the assaults took place at night in a dimly lit area; (2) both assailants wore masks; (3) the one witness who identified the assailants was hysterical at the time of the assaults; (4) the witnesses were shown the photographs when their memories were no longer fresh and when they had already demonstrated an inability to make a positive identification of the individuals pictured; (5) the photographs focussed on the two defendants; (6) the witnesses knew that the persons in the photographs had been arrested and charged with this particular crime; and (7) on cross-examination, the witness who identified the individuals shown in the photographs as her assailants admitted that viewing the photographs might have added some element of suggestion to her subsequent in-court identification.

In Clemons v. United States, 133 U.S. App. D.C. 27, 408 F.2d 1230 (1968), cert. denied, 394 U.S. 964 (1969), this Court of Appeals held that where the prosecution intends to offer only an in-court identification, the defense may challenge its admissibility and the court must then decide whether a pretrial identification by the same eyewitness is violative of due process or the right to counsel. (See 133 U.S. App. D.C. at 34, 408 F.2d at 1237.) Again, it is recognized that there was no positive pretrial identification of the defendants in this case. Nevertheless, there was in a sense, a pretrial confrontation through the use of the photographs which was, under the rationale of the Simmons case, violative of due process.

In Clemons, the Court went on to say that once the in-court identification is found to violate due process, the trial court must then decide whether such identification has an independent source and is therefore, admissible. (See 133 U.S. App. D.C. at 34, 408 F.2d at 1237.)

In United States v. Wade, 388 U.S. 218 (1967), the Supreme Court held that the burden is on the government to show by "clear and convincing" evidence that the in-court identification is based upon observations independent of the pretrial confrontation. (See 388 U.S. at 240.) In Wade, the Court mentioned the

following factors to be considered in determining whether an independent source can be established: (1) the prior opportunity to observe the alleged criminal act; (2) the existence of any discrepancy between any pre-lineup description and the defendant's actual description; (3) any identification prior to line-up of another person; (4) the identification by picture of the defendant prior to line-up; (5) failure to identify the defendant on a prior occasion; and, (6) the lapse of time between the alleged act and the line-up identification. (See 388 U.S. at 241.)

Several times throughout the trial of the appellant, the witness Oosterhof stated that her identification was based upon seeing the men at the time of the assaults and robbery (Tr. 16, 49, 179-80, 215). While such testimony is, of course, important in determining whether an independent source can be shown, it is not conclusive or, in and of itself, sufficient to make such showing.

The recent case entitled Mason v. United States, _____ U.S. App. D.C. _____, 414 F.2d 1176 (1969), illustrates the latter point. In that case, a young, female bank teller permitted the withdrawal of a substantial sum of money on a forged withdrawal slip. She had been employed at the bank for a little over three months. Despite the fact that the withdrawal was

unusually large, she had neither compared the signature on the withdrawal slip with the depositor's signature card nor asked for any identification. Several hours after the withdrawal, the teller was shown a single photograph of a man and was told that he was the suspect. She identified him as the culprit and, at trial, testified that she remembered "*** what he looked like when he came up to my window". While noting that the teller appeared to be a competent and composed witness, and that she had no doubt that the defendant was the man, the appellate court also noted that her prompt identification pleading to apprehension "could have promised to get her out of some very hot water". ^{5/} The court said, "Without questioning her sincerity or intelligence, we cannot ignore the fact that [sic] such circumstances maximize the dangers inherent in single-suspect identifications". (See _____ U.S. App. D.C. at _____, 414F.2d at 1182.) As a result, this court held that no reference to the photographic identification could be made before the jury and, since it could not be said that the photographic identification rested on an independent basis, the court could not find "clear and convincing evidence" of an independent source for an in-court identification. (See _____ U.S. App. D.C. at _____, 414F.2d at 1182.)

^{5/} In Wade, the Supreme Court noted similar compulsions' for identification in the context of a rape prosecution. [388 U.S. at 230.]

The following analysis of the case at bar under the guidelines established in Wade as enumerated above, clearly shows that Miss Oosterhof's statements are not sufficient and that the government failed to show the necessary independent source by "clear and convincing evidence":

1. Prior opportunity to observe the alleged criminal act. This point has already been extensively discussed and a brief reiteration of the salient facts should be sufficient. The criminal act in this case took place at 12:30 a.m. in the morning (Tr. 124). The lighting at the scene of the crime was poor at best. (See Tr. 41-42, 52.) Both assailants wore masks for at least part of the time during the assaults (Tr. 11-12, 51, 220-21). At the time of the criminal act, Miss Oosterhof was "terrified" and "hysterical". (Tr. 50, 220.)

2. The existence of any discrepancy between any pre-line-up description and the defendant's actual description. Miss Oosterhof's description of her assailants was very sketchy. She said that one was taller, larger and had short hair, while the other was smaller, thinner and had bushier hair. By way of contrast, the witness Murawski, who at trial was unable to identify either defendant as one of the assailants (Tr. 136-37), did give a rather complete description to the police on the night of the crime. (Tr. 11-12, 135.)

3. Any identification prior to line-up of another person. Here, before having been shown the photographs, Miss Oosterhof selected from a line-up two men as "resembling" her assailants (Tr. 244). One of these men was the appellant Hunter (Tr. 227); the other was never charged or involved in this case at all (Tr. 251-52).

4. The identification by picture of the defendant prior to line-up. The use of photographs in this case has been extensively discussed hereinbefore.

5. Failure to identify the defendant on a prior occasion. On October 8, 1968, six days after the assault (Tr. 122-24), Miss Oosterhof viewed a line-up (Tr. 15). The appellant Hunter was in the line-up (Tr. 25), but neither Mr. Murawski or Miss Oosterhof could identify him as one of their assailants. Rather, Miss Oosterhof merely selected him as "resembling" one of her assailants (Tr. 244). Miss Oosterhof testified that she was "terrified" at the time of the line-up (Tr. 224). While her hysteria might affect her ability to make a reliable identification, the fact remains that her emotional state during the line-up was substantially similar to her emotional state on the night of the crime (Tr. 50, 220). Moreover, the lighting at the line-up was considerably better than at the crime (Tr. 54). As a result, Miss Oosterhof's opportunity to observe was certainly better at the

line-up than at the crime scene and yet, she still failed to make an unequivocal identification.

5. The lapse of time between the alleged act and the line-up identification. The criminal act took place on October 2, 1968 (Tr. 122-24), and Miss Oosterhof was not shown the photographs until January 28, 1969 (Tr. 170), a lapse of more than three months. Obviously, her memory was not fresh at that time.

In summary, weighing Miss Oosterhof's statements against the guidelines established in Wade, demonstrates that the prosecution did not show an independent source through "clear and convincing evidence".

Even though the use of photographs was "impermissibly suggestive" under the principles of Simmons and fatally tainted the subsequent in-court identification under the Wade guidelines, the question remains whether this constitutional error can be ignored because it was "harmless beyond a reasonable doubt". (See Chapman v. California, 386 U.S. 18, 24 (1967).) In this regard, this court recently held, in Taylor v. United States, _____ U.S. App. D.C. _____, 414F.2d 1142 (1969), that in applying the harmless error doctrine discussed in Chapman the appellate court must look to all the evidence, defense and prosecution alike, and bring judgment to bear upon the question of whether it is clear beyond a reasonable doubt that a guilty

verdict would have resulted even if the jury had never heard the challenged testimony. [_____ U.S. App. D.C. at _____, 414 F.2d at 1144-45.]

Here, aside from Miss Oosterhof's positive in-court identification of the appellant, all of the evidence linking him with the crime was circumstantial consisting of (1) a latent fingerprint found on the outside window surface of an automobile taken from the complaining witness (Tr. 316-17); (2) the fact that the stolen automobile was located within one block of the appellant's home some twenty-four hours after the incident (Tr. 262-63), and (3) the fact that certain credit cards belonging to the complaining witness were found in the automobile in which the appellant was subsequently arrested. (Tr. 337, 352.) It is submitted that such evidence, standing alone and without the tainted identification, would not have been sufficient to support a finding of guilt.

As Judge J. Skelly Wright noted in his concurring opinion in Taylor v. United States, _____ U.S. App. D.C. _____, 414 F.2d 1142 (1969), "*** where the jury's deliberations are infected by identification testimony produced by police procedures lacking in due process, it is realistically impossible in most cases, simply by reading the record, to determine with assurance beyond a reasonable doubt that the jury, or at least

one juror, was not influenced by the tainted evidence". [_____
U.S. App. D.C. at _____, 414 F.2d at 1145.]

Undoubtedly, in the context of a rape case the identification testimony of the complainant carries considerable weight with the jury. The failure of the complainant to identify is similarly of great import. In the context of a sex case generally and in this case in particular, it is impossible to say that the identification was harmless beyond a reasonable doubt.

Hunter's conviction on all counts rests primarily upon this identification and, therefore, must be reversed.

II. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL AFTER THE INTRODUCTION OF INFLAMMATORY AND PREJUDICIAL TESTIMONY OF THE COMPLAINING WITNESS TO THE EFFECT THAT SUSPECTS IN A POLICE LINE-UP (WHICH INCLUDED THE APPELLANT) WERE "MASTURBATING" AND PERFORMING OBSCENITIES AT THE TIME SHE VIEWED THE LINE-UP. ^{6/}

On direct examination, the prosecutor asked the complainant, Miss Oosterhof, what she remembered of a line-up she viewed on October 8, 1968 (Tr. 224). She replied that "*** all the men in the line-up looked very frightening to me, and a lot of them were saying and doing very disgusting things". (Tr. 225). When asked what they were saying, she replied that "They were saying crude things and some of them were masturbating openly". (Tr. 225).

While the appellant Hunter was in the line-up (Tr. 283-84), he was never identified as being one of the persons who was either masturbating or making vulgar or disgusting comments. Counsel for co-defendant Gambrill joined by appellant Hunter's counsel, moved to exclude this statement (Tr. 225-26) and for a mistrial. The Trial Court, however, allowed the testimony to go to the jury and refused to declare a mistrial.

The appellant urges that the introduction of this testimony constituted error and such error was not harmless in the context of this case since it clearly suggested to the jury that

^{6/} In support of Appellant's Argument II, the Court's attention is respectfully directed to the following pages of the transcript. Tr. 224-226, 283-284.

all of the persons in the line-up, including the two defendants, were openly engaging in sexually perverse and reprehensible conduct even in the custody of police and in the presence of the complainant and others who viewed the line-up. The clear implication was that each person in the line-up was more than likely a sex deviate fully capable of perpetrating the outrageous assault described by the complainant.

In Fairbanks v. United States, 96 U.S. App. D.C. 345, 226 F.2d 251 (1955), the court dealt with the question of testimony describing the defendants' prior lewd behavior and deviations in the context of a sex offense and is illustrative on this point.

In Fairbanks, the defendant was indicted for rape and convicted of assault with intent to commit rape. (See 96 U.S. App. D.C. at 346, 226 F.2d at 252.) One witness for the prosecution (not the complainant), testified that, six days before the alleged rape, the defendant had come to her door wearing only his shorts, with his private parts exposed. (See 96 U.S. App. D.C. at 346, 226 F.2d at 252.)

This Court held that the introduction of such testimony was reversible error since this testimony did not cover the same or a similar offense and, therefore, it was not evidence of a predisposition to commit rape. (See 96 U.S. App. D.C. at 347, 226 F.2d at 253.) The Court, noting a number of decisions

establishing that the character of a defendant may not be attacked unless he puts his character in issue, held that the testimony raised a collateral issue which might have easily confused the jury and, in effect, improperly and involuntarily placed the defendant's character in issue. (See 96 U.S. App. D.C. at 347-48, 226 F.2d at 253-54.) The Court concluded that, in the context of the Fairbanks case, the error was not harmless. (See 96 U.S. App. D.C. at 349, 226 F.2d at 255.)

In Harper v. United States, 99 U.S. App. D.C. 324, 239 F.2d 945 (1956), this Court dealt with the introduction of similar testimony. There the Court noted that "Evidence tending to prove merely criminal disposition is excluded because of the likelihood that it would weigh too heavily with the jury". (See 99 U.S. App. D.C. at 325, 239 F.2d at 946.)

In the present case, the jury was fully aware that appellant Hunter was in the line-up viewed by the complaining witness on October 8, 1968 (Tr. 283-84). The complaining witness stated, without qualification or further clarification, that the suspects in the line-up were performing certain obscenities and were masturbating as she viewed the line-up (Tr. 225). This testimony was shocking to say the least. If believed by the jury, as most of the complaining witness' testimony assuredly was, the jury was left with the unmistakable impression that appellant

Hunter was performing a lewd sexual act before the complaining witness, even while in the custody and presence of police officials conducting the line-up.

Under the circumstances of this case (involving a serious sex offense), this testimony placed in issue the appellant's character when he had not done so and by innuendo tended to show his disposition to sexual perversion and sexual crimes.

Such testimony had considerable impact and undoubtedly disgusted and influenced the jury. The admission of such testimony was error and the Court's refusal to grant a mistrial upon its introduction was, in the context of this case, not harmless.

(See Fairbanks v. United States, supra).

III. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING THE APPELLANT THE OPPORTUNITY TO CALL A CORROBORATING WITNESS WHO HAD BEEN PRESENT IN COURT DURING THE TRIAL AND WHOSE TESTIMONY BECAME IMPORTANT TO APPELLANT AT THE LATER STAGES OF THE TRIAL ONCE THE CO-DEFENDANT, THROUGH COUNSEL, REPUDIATED THE DEFENDANT'S ALIBI DEFENSE. ^{7/}

During the course of the trial, counsel for appellant Hunter sought leave to call McKinley Hunter, Sr., the appellant's father as a witness, to corroborate portions of the alibi defense (Tr. 436-37). McKinley Hunter, Sr., had been present in the courtroom throughout the trial (Tr. 436-37).

Counsel for co-defendant Gambrill vigorously objected to counsel's proffer of proof upon the ground that McKinley Hunter, Sr., had been present in the courtroom throughout the trial and had heard the other defense witnesses testify (Tr. 437). This objection was sustained and appellant's father was precluded from testifying (Tr. 437).

Appellant Hunter contends that this ruling amounted to prejudicial error and warrants reversal of his conviction.

In Holder v. United States, 150 U.S. 91 (1893), the Supreme Court, while noting that the exclusion of a witness who has violated a sequestration order lies within the sound discretion of the trial judge, said that exclusion of testimony by such a witness could be sanctioned only under particular circumstances. (See 150 U.S. at 92.) The Court pointed out that the

^{7/} In support of Appellant's Argument III, the Court's attention is respectfully directed to the following pages of the transcript. Tr. 382-384, 410-411, 418-420, 436-437.

witness' testimony and his exposure to the testimony of others is open to comment to the jury. (See 150 U.S. at 92.)

Undoubtedly, the prime purpose of sequestration is to prevent the shaping of testimony to match that of other witnesses. (See Gregory v. United States, 125 U.S. App. D.C. 140, 147, 369 F.2d 185, 192 (1966).) Nevertheless, several courts, in interpreting Holder, point out that while sequestration is helpful in eliciting the truth, disqualification of the witness is too harsh a penalty on the innocent litigant. These courts take the view that disqualification is proper only when the witness is present with the consent, connivance, or knowledge of the litigant or his counsel. (See United States v. Schaeffer, 299 F.2d 625, 631 (7th Cir. 1962), cert. denied, 370 U.S. 917 (1962); Taylor v. United States, 388 F.2d 786, 788 (9th Cir. 1967).)

Two cases arising in this Circuit illustrate the latitude which a court is willing to give a sequestration order.

In Smith v. United States, 106 U.S. App. D.C. 318, 272 F.2d 547 (1959), the defendant was charged with assault with a dangerous weapon. Sanity was the prime issue. The arresting officer testified that the defendant was "incoherent" following the attack. The following day, with the officer present in the courtroom, the prosecution moved to recall him as a witness. The prosecutor stated, in open court and in the presence of the

witness, that the witness had meant to say "coherent" rather than "incoherent" and, that if he were recalled, he would testify that he had misunderstood the question. The trial court allowed the officer to be recalled and this decision was upheld by this Court. (See 106 U.S. App. D.C. at 319-22, 272 F.2d at 548-51.)

In Matz v. United States, 81 U.S. App. D.C. 326, 158 F.2d 190 (1946), a prosecution for bigamy, the Court expressed concern that the prosecution had not produced a witness to prove that the defendant and his first wife had lived together. The father of the first wife, who had remained in the courtroom while other witnesses had been excluded, volunteered to testify on this point and the trial court permitted him to do so. (See 81 U.S. App. D.C. at 327, 158 F.2d at 191). This Court sustained the action of the trial court.

In the present case, counsel for appellant Hunter interviewed McKinley Hunter, Sr., the appellant's father, prior to trial and concluded that his testimony would not materially assist the defense (Tr. 436). However, after appellant Hunter's alibi witnesses had testified, appellant's father approached counsel with new information, indicating that he could corroborate certain statements of the alibi witnesses (Tr. 436-37).

The corroboration of the testimony of the defense witnesses became critical at this stage of the trial since the trial court had, upon motion of counsel for the co-defendant, instructed the jury that the witnesses' testimony was offered on

behalf of appellant Hunter only and was not to be considered in relation to the co-defendant Gambrill (Tr. 410-11).

The alibi testimony had linked the two defendants together on the day of the crime (Tr. 382-84, 418-20). The instruction and the circumstances under which it was given clearly indicated that the co-defendant was disavowing and repudiating the alibi defense and scorning the testimony of the appellant's witnesses.

The credibility of the defense witnesses having been thus questioned, if only by implication and innuendo, the corroborating testimony of McKinley Hunter, Sr., was necessary to bolster that credibility.

It cannot be seriously contended that he was not present in the courtroom as a witness with the consent, connivance or knowledge of the appellant or his counsel (See Tr. 436-37). Furthermore, as the Supreme Court noted in Holder, his testimony was open to cross-examination and comment to the jury.

In the context of this case, the exclusion of McKinley Hunter, Sr., was too harsh a penalty to impose on appellant Hunter. (See United States v. Schaeffer, 299 F.2d 625, 631 (7th Cir. 1962), cert. denied, 370 U.S. 917 (1962)). The exclusion of this witness by the Trial Court was an abuse of discretion and error, and was not harmless in that it went to the heart of appellant's only affirmative defense. Therefore, appellant's conviction should be reversed on all counts.

IV. THE TRIAL COURT ERRED IN REFUSING TO DECLARE A MISTRIAL AND GRANT APPELLANT'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER ONCE THE CO-DEFENDANT, THROUGH COUNSEL, REPUDIATED AND DISAVOWED THE APPELLANT'S ALIBI DEFENSE. ^{8/}

The issue of prejudicial joinder was initially raised in the pretrial motion of the co-defendant Gambrill and thereafter, by counsel for Gambrill at various stages of the trial. Counsel for the appellant Hunter did not move to sever the defendants during the pretrial stage or at any time until the co-defendant, by counsel during the course of the trial, repudiated and disavowed the alibi defense offered on behalf of the appellant Hunter. (Tr. 410).

From the co-defendant's pretrial motion for relief from prejudicial joinder through the trial, counsel for the co-defendant adopted the attitude and a corresponding trial strategy based upon the supposition that the evidence of the prosecution weighed much more heavily upon the appellant Hunter than upon

^{8/} In support of Appellant's Argument IV, the Court's attention is respectfully directed to the following pages of the transcript. Tr. 4, 382-85, 410, 416-20, 437.

the co-defendant Gambrill (See e.g., Tr. 4, 410). 9/ Thus, counsel for the co-defendant urged that the co-defendant Gambrill not be found guilty by the association with the appellant Hunter and repeatedly sought to minimize the evidence against Gambrill by comparing the quantum of proof against the appellant Hunter. 10/

In the presentation of appellant's affirmative defense, during the trial, his witnesses testified that both of the defendants were with the witnesses in Hyattsville, Maryland at the time of the alleged offense (Tr. 382-85, 416-20). At this juncture, counsel for the co-defendant requested a bench conference during which he disavowed and repudiated the appellant's alibi defense and characterized the situation as "inherent [sic] ridiculous". (Tr. 410).

After reviewing his motion for relief from prejudicial joinder, counsel for the co-defendant insisted that the trial

9/ In point of fact, the only evidence presented against the appellant Hunter which was not common to both defendants was (1) a latent fingerprint of the appellant Hunter on the outside surface of the complainant's automobile, and (2) the fact that the complainant reluctantly picked the appellant Hunter from the October 8, 1968 line-up as a person who "resembled" one of her assailants.

10/ Counsel, in making this point, does not mean to suggest or imply any criticism of the conduct of trial counsel for the co-defendant. The point is made, rather, to illustrate the divergence of trial strategy and the prejudicial effect of the joinder.

court advise and instruct the jury that the testimony of the alibi witnesses was offered solely on behalf of the appellant Hunter. The court so instructed the jury, 11/ leaving the clear implication that the co-defendant was repudiating the alibi defense even though, if believed, it would have exonerated the co-defendant as well as the appellant Hunter.

Moreover, counsel for the co-defendant subsequently objected to appellant's request for leave to call his father as a witness to corroborate certain portions of the testimony of the alibi witnesses (Tr. 437). 12/ These objections were sustained and the appellant was denied opportunity to introduce such corroboration (Tr. 437).

Thus, during the course of the trial, if not before, it became apparent that the defenses of the co-defendants were inconsistent and that the appellant could not adequately present his sole affirmative defense without objection by or prejudice to the co-defendant.

11/ The full text of the trial court's instruction on this point is set out in full in the Statement of the Case, supra, p. 12.

12/ The trial court's refusal to permit the witness to take the stand and offer such testimony is urged as an independent ground for reversing the conviction in Part III, supra, pp. 34-37.

In Schaffer v. United States, 362 U.S. 511, 515 (1960), the Supreme Court emphasized the duty of the trial court, at all stages of the trial, to grant a severance if prejudice appears. Undoubtedly, in this case prejudice appeared both when the appellant was refused leave to call his father as a corroborating witness because of his co-defendant's objection and when the trial court, upon motion of co-defendant's counsel, instructed the jury that the appellant Hunter's witnesses were offered on behalf of appellant Hunter only, thus, in effect, repudiating appellant's alibi defense.

In Blumenthal v. United States, 332 U.S. 539 (1947), the Supreme Court recognized the danger that, in jointly trying two or more defendants, the jury might convict one co-defendant on the basis of evidence adverse to another. The court noted that adequate instructions might provide a safeguard against such a possibility. (See 332 U.S. at 559.) A number of decisions in considering this problem, have stressed that the trial judge gave careful instructions to consider the evidence separately as to each defendant (See e.g., Dykes v. United States, 114 U.S. App. D.C. 189, 313 F.2d 580 (1962), cert. denied, 374 U.S. 837 (1963); Barnes v. United States, 127 U.S. App. D.C. 95, 381 F.2d 263 (1967).)

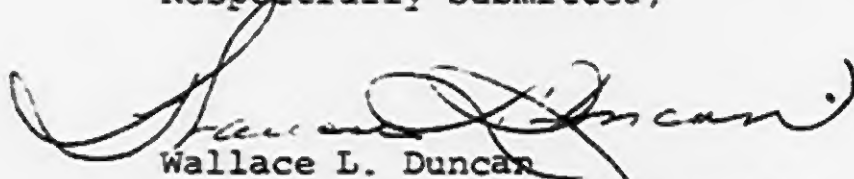
In the present case, it was impossible for the trial court to adequately guard against the prejudice to appellant Hunter. An instruction (such as the one given) to consider the

evidence separately as to each defendant actually caused, rather than cured the prejudice, since it amounted to a repudiation of the appellant Hunter's alibi defense.

CONCLUSION

For the reasons stated and upon the authorities cited in each of the points above, appellant's conviction must be reversed, on each of the six counts of the indictment.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Wallace L. Duncan", is written over the typed name.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief for Appellant was served upon the United States Attorney, Counsel for Appellee, by mailing two copies thereof postage prepaid to Thomas Flannery, United States Attorney, United States Courthouse, 3rd & Constitution Avenue, N.W., Washington, D.C. 20001, this 16th day of March, 1970.

A handwritten signature in cursive script, appearing to read "Wallace L. Duncan", written over a horizontal line.

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